2010 WL 2292451 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

Joshua BROWN, Appellant (Defendant below),
v.
STATE OF INDIANA, Appellee (Plaintiff below).

No. 54A01-0912-CR-575.
April 23, 2010.

Appeal from the Montgomery Circuit Court, Cause No. 54C01-0506-FC-88, The Hon. Thomas K Milligan, Judge

Brief of Appellee

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***1 STATEMENT OF THE ISSUES**

I. Whether Defendant may challenge the weight given to mitigating factors considered by the trial court.

II. Whether Defendant's eight-year sentence is appropriate in light of the nature of his offense and his character.

STATEMENT OF THE CASE

Nature of Appeal

Joshua Brown ("Brown") brings this belated appeal challenging his eight-year sentence imposed following his guilty plea to class C felony possession of methamphetamine.

***2** *Course of Proceedings*

On June 1, 2005, Defendant was charged with possession of methamphetamine as a class C felony, possession of ephedrine or pseudoephedrine as a class C felony, carrying a handgun without a license as a class C felony, possession of precursors as a class C felony, leaving the scene of a property damage accident as a class B misdemeanor, and driving while suspended as a class A misdemeanor (App. 9-12).

On November 29, 2005, a plea agreement was filed with the court in which Defendant agreed to plead guilty to class C felony possession of methamphetamine in exchange for the State's agreement not to file a habitual offender affidavit and to dismiss the remaining charges (App. 5, 58-59). The plea agreement left sentencing to the discretion of the court (App. 58-59). On January 27. 2006, the court accepted Defendant's plea agreement and sentenced him to eight years executed (Tr. 3-19).

On November 30, 2009, Defendant filed his Verified Petition for Leave to Prosecute Appeal as an Indigent Person and Notice of Appeal, *pro se* (App. 7; Docket). On December 16, 2009, the court appointed Mark Small as indigent counsel to Defendant, and granted his Motion to File Belated Notice of Appeal (App. 101-106). On December 16, 2009, Defendant filed his Petition for Leave to File Belated Notice of Appeal (App. 1; Docket).

On December 3, 2009, Notice of Completion of Clerk's Record was filed (Docket). On February 18, 2009, Notice of Completion of Transcript was filed (Docket). On March 22, 2010, the Appellant's Brief and one volume appendix was filed (Docket).

STATEMENT OF THE FACTS

On May 29, 2005. an officer was dispatched to a disabled vehicle in Montgomery County. (App. 13). The vehicle was found in a ditch and had front-end damage. (App. 13). ***3** Upon inspection, the officer found fifty rounds of .22 caliber ammunition in the vehicle. (App. 13-14, 21). The officer found two people walking toward a nearby McDonalds restaurant whose descriptions matched those given by an eyewitness at the scene. (App. 13-14, 21). At McDonalds, the officer noticed four duffle bags on the ground beside Defendant. (App. 13-14). Defendant was acting extremely nervous, wringing his hands and profusely sweating. (App. 23). For safety reasons, the officer handcuffed Defendant, patted him down, and found a .22 caliber bullet and a large folding knife in Defendant's pants pocket. (Tr. 14, 23). A search of his duffle bags resulted in the discovery of a digital scale and coffee grinder containing methamphetamine powder and a nine shot Harrington and Richardson revolver. (App. 14, 24). The officer also found clear plastic baggies containing white powder and white ephedrine caplets. (App. 14, 24). Also recovered from Defendant's bag were several packages of Energizer lithium batteries and a number of white ephedrine or pseudoephedrine caplets and powder commonly used to "clandestinely manufacture methamphetamine." (App. 14-15).

On June 1, 2005, Defendant was charged with possession of methamphetamine as a class C felony, possession of ephedrine or pseudoephedrine as a class C felony, carrying a handgun without a license as a class C felony, possession of precursors as a class C felony, leaving the scene of a property damage accident as a class B misdemeanor, and driving while suspended as a class A misdemeanor. (App. 9-12). (App. 9-12). He entered into a plea agreement on November 29, 2005, in which he agreed to plead guilty to possession of methamphetamine as a class C felony in exchange for dismissal of the five remaining counts and for the State to forgo filing a ***4** habitual offender affidavit. (App. 58-59). Defendant's sentence was left to the discretion of the court. [1] (App. 5, 58-59).

At Defendant's guilty plea hearing on January 27, 2006, Defendant admitted that he possessed methamphetamine while in possession of a Harrington and Richardson nine shot revolver, contrary to Indiana Code Section 35-48-4-6. (Tr. 2-19; App. 5, 58-59). The court accepted Defendant's plea agreement, entered judgment of conviction, and sentenced him to eight years executed. (Tr. 3-19; App. 90-91). At sentencing the court stated:

The court in considering sentencing is obliged to consider the character of the defendant, the circumstances surrounding the commission of the offense and other aggravating or mitigating circumstances that may have a bearing on the sentence to be imposed. The court will find based *on* information in the presentence report, [Defendant] comes from an **abusive** background and his apparently his father had a drug and alcohol problem and that caused problems for the whole family and not only was [Defendant] and his brothers and sisters beaten, but his mother was too and that the beatings got out of control and [Defendant] was beaten severely and his father went to prison for a long time for that. The court will find that [Defendant] has never been married and has no children although he's got a significant other that he maintains a relationship with. He was not able to finish high school leaving the eleventh grade. He's yet to get his GED or his high school diploma. His employment has been sporadic because he's been in so much trouble with the law he's not been able to maintain employment for any significant period of time. He's presently working; just prior to his arrest he was working some construction as a self-employed person with his cousin. Has had some work in the prison to help pass the time and keep busy. The most significant aspect of [Defendant's] character 1 guess is the criminal history which is significant. It started in nineteen ninety-six and has pretty much continuously been involved in the criminal justice system since then. Although as Mr. Christoff notes he was not under supervision of any court or other authority when this offense was committed. He's had a significant history of substance **abuse** which is reflected in the criminal history and this ***5** is clearly a substance, possession of illegal substance which is aggravated with the possession of a handgun at the same time. [Defendant] has five previous felony convictions. Most recently he did parole violation time and was released about three or four months prior to this offense occurring, maybe six or seven months prior. The court does not believe that [Defendant] is a suitable candidate for any sort of suspended sentence, either probation or community corrections. The court believes based on the criminal history that the sentence should be enhanced. It will be the judgment of the court that [Defendant] be committed to the Indiana Department of Corrections for a period of eight years....consecutive to the time that's being served in Illinois....

(Tr. 16-18).

SUMMARY OF THE ARGUMENTS

I. The trial court did not **abuse** its discretion in sentencing Defendant to an eight-year executed term for class C felony possession of methamphetamine. The sentencing statement reveals the court did consider any childhood **abuse** that took place, but declined to give this factor any significant weight. A trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, and therefore, can not now be said to have **abused** its discretion in failing to properly weigh such factors. The trial court did not **abuse** its discretion and Defendant's sentence should stand.

II. Defendant fails to develop any cogent argument for why his sentence is inappropriate; thus this issue is waived. Nonetheless, Defendant's eight year executed sentence for class C felony possession of methamphetamines is appropriate. The nature of the offense was indeed serious as it did not merely involve a small amount of methamphetamine. Other items found in Defendant's duffle bags indicated his involvement in the manufacturing of methamphetamine. The combination of firearms, ammunition, a knife and the dangerous and deadly methamphetamine drug renders the nature of the offense quiet volatile and dangerous.

***6** Defendant's character alone renders it impossible for Defendant to show that this sentence is inappropriate. At only twenty-six years of age, Defendant has accumulated a significant and extensive criminal record which supports the appropriateness of his sentence. His record includes nineteen convictions, five of which are felonies. Further, his plea agreement allowed five other charges to be dismissed, and the State agreed not to pursue a habitual offender finding, which *substantially* reduced his

sentencing exposure. Defendant's attempts to blame his **abusive** childhood on his actions further demonstrate his character problems. The Court can conclude that his eight-year sentence is appropriate.

ARGUMENTS

I. Defendant may not challenge the weight given to mitigating factors considered by the trial court. [2]

The trial court properly sentenced Defendant. A court may impose any sentence that is authorized by statute "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Although not required to find aggravators or mitigators, the legislature does require a trial court to issue a statement of its reasons for selecting a sentence. I.C. § 35-38-1-3(3). Sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an **abuse** of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds*, 875 N.E.2d 218 (Ind. 2007). A trial court **abuses** its discretion in the finding of aggravating circumstances only if they are not supported by the record or are invalid as a matter of law. *Id*. at 490-91. A trial court **abuses** its discretion if it fails to consider mitigating factors that are clearly supported by the record. *Id*. An allegation that the trial court failed to find a mitigating factor requires the defendant to show that the alleged mitigator is ***7** both significant and clearly supported by the record. *Id*. at 493. A trial court, however, "no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence," and therefore, "can not now be said to have **abused** its discretion in failing to 'properly weigh' such factors." *Id*. at 491.

The pre-sentence investigation report reflects that Defendant and his younger brother were severely beaten by their father during a visitation when Defendant was eleven years old and he suffered injuries that required a week-long hospital stay. (PSI at 6). His father was convicted of aggravated battery on a child and cruelty to children and received a twenty-five year sentence on the aggravated battery conviction. (PSI at 6). However, it is clear from the sentencing statement that the trial court did not overlook Defendant's alleged **abusive** childhood at the hands of his father, as the sentencing statement set forth the court's consideration of this **abuse** as follows:

> "The court will find based on information in the pre-sentence report, [Defendant] comes from an **abusive** background and his apparently his father had a drug and alcohol problem and that caused problems for the whole family and not only was [Defendant] and his brothers and sisters beaten, but his mother was too and that the beatings got out of control and [Defendant] was beaten severely and his father went to prison for a long time for that...."

(Tr. 16-17).

Defendant's argument that the court did not consider his childhood **abuse** is incorrect. The trial court did consider it; it merely chose not to give it significant weight. [3] Whatever weight the court assigned to any childhood **abuse** as a mitigating circumstance is not subject to ***8** review for **abuse** of discretion. *See Anglemyer*, 868 N.E.2d at 490. The trial court did not **abuse** its discretion and Defendant's sentence should stand.

II. Defendant's eight-year sentence is appropriate.

Standard of Review

Article VII, Sections 4 and 6 of the Indiana Constitution " 'authorize [ ] independent appellate review and revision of a sentence imposed by the trial court.' " *Anglemyer v. State*, 868 at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in

light of the nature of the offense and the character of the offender." The Court will exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that the Court gives "due consideration" to that decision and because it recognizes the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d at 1080.

Waiver of Appropriateness Argument

To the extent that Defendant frames his argument under Indiana Appellate Rule 7(B), which grants this court authority to review a sentence for appropriateness in light of the nature of the defendant's *offense* and his character, Defendant has failed to make a cogent argument regarding why his sentence is inappropriate with regard to the nature of his offenses *and his* character. It is well-established that a failure to make a cogent argument regarding the nature of the defendant's offense and the defendant's character results in waiver of the defendant's appropriateness claim. *Johnson v. State*, 837 N.E.2d 209, 217 (Ind. Ct. App. 2005).

***9** Further, although framed as an appropriateness challenge, Defendant's argument is not really geared toward discussing the nature of his offense and his character. Rather, his argument is largely one focused on a mitigating factor that Defendant claims should be given more weight. (Appellant's Br. 5-9). Defendant's only argument supporting his claim that his sentence is inappropriate under Appellate Rule 7(B) pertains to the nature of the offense, where he claims he possessed ephedrine not methamphetamine, and he fails to make any argument regarding his character. (Appellant's Br. 6-8). Thus, he has waived any claim to the appropriateness of his sentence.

Nature of the Offense and Character of the Offender

Waiver notwithstanding, Defendant's sentence is appropriate. As for the nature of Defendant's offense, Defendant offers that the offense involves "residue" on the scales found in his duffle bag thus the sentence is too harsh. (Appellant's Br. 8). Although the amount found on the scale may have been small, the officers also located evidence of drug manufacturing, namely, a digital scale and coffee grinder containing methamphetamine powder, several packages of Energizer lithium batteries and a number of white ephedrine or pseudoephedrine caplets and powder all used to "clandestinely manufacture methamphetamine." (App. 14-15, 23-24). Methamphetamine is a very addictive and deadly drug, which combined with the handgun, the .22 caliber bullet and knife found in Defendant's pocket and fifty rounds of .22 caliber ammunition found in the vehicle, should persuade the Court the nature of this offense is indeed serious. (App. 14, 21).

Defendant's character alone renders it impossible for Defendant to show that this sentence is inappropriate. For someone who was only twenty-six years old at the time of his sentencing. Defendant has accumulated a significant and extensive criminal record. His record ***10** includes nineteen convictions, with his first conviction at fifteen years of age for criminal trespass. (PSI 1-6). His first felony conviction - he is on his sixth - was at age seventeen, when he was tried as an adult for possession of cannabis with intent to deliver. (PSI 1-6). His felonies include **financial** exploitation of the **elderly** and three convictions for unlawful possession of a weapon by a felon. (PSI 1 - 6). Defendant also received multiple misdemeanor convictions for driving while suspended and battery. (PSI 1-6).

Further, after Defendant was charged in this case he quickly amassed two more illegal possession of a weapon by a felon charges within two months. (PSI 4). He also has numerous violations of probation, which clearly shows that he does not take probation seriously and reflects poorly upon his character. (PSI 1-2). The varied convictions for possession of firearms and drug related crimes support the appropriateness of Defendant's eight-year sentence. Defendant needs the intervention that incarceration can provide as he has clearly shown that he will continue to commit crimes unless he is incarcerated.

Additionally, Defendant's guilty plea allowed for dismissal *of five* of the six counts: possession of ephedrine or pseudoephedrine as a class C felony, carrying a handgun without a permit as a class C felony, possession of precursors as a class C felony, leaving the scene of a property damage accident as a class B misdemeanor, and driving while suspended as a class A misdemeanor

(App. 59-59). The State also agreed to not file a habitual offender (App. 58-59). Should Defendant had been tried on all counts and convicted, his sentence would have been much more severe than the eight years he received, a factor he undoubtedly considered when pleading guilty to the class C felony possession charge. Even granting that double jeopardy could have prevented convictions on all the charged crimes, Defendant still *substantially* reduced his sentencing exposure by the dismissal of all five charges and the State's agreement not to ***11** pursue the habitual offender allegation. His plea was more a strategic decision to avoid the potentially greater criminal liability for the original charges as well as the habitual offender violation and less a reflection of his good character. *See Scott v. State*, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006).

Finally, Defendant's attempts to blame his **abusive** childhood on his actions further demonstrate problems with his character. It has been determined that evidence of a difficult childhood warrants little, if any, consideration at sentencing. *See Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000). Further, the record shows that Defendant had recovered from this and repaired his relationship with his father as he has "forgiven and forgotten" and communicates with him by telephone and letters. (PSI 6). Thus, in light of the nature of Defendant's offense and his character the Court should conclude that his eight-year sentence is appropriate.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the trial court.

Footnotes

1 Although Defendant argues in parts of his Appellant's Brief that his plea agreement contained a cap of eight years, this is not the case. (Appellant's Br. 1-9; App. 58-59). The plea agreement left sentencing to the court's discretion. (App. 58-19; Tr. 3).

2 Because Defendant's offense was committed after the April 25, 2005, revisions of the sentencing scheme, his sentence is reviewed under the current advisory sentencing scheme. *See Anglemyer v. Stale*, 868 N.E.2d 482, 491 (Ind. 2007)

3 The trial court was not required to grant this proposed mitigator any weight. *See Loveless v. State*, 642 N.E.2d 974. 977 (Ind. 1994) (trial court was under no obligation to consider as mitigating defendant's "overwhelmingly difficult" childhood where there was no indication of how the defendant's admittedly painful childhood was relevant to her level of culpability).

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